also have generally held that the defense of estoppel *in pais* need not be pleaded to be proved, is illogical and opposed to the spirit of the code. In the *Krieg* case (the recent Indiana case cited above) the court took the more logical position, and, following the uniform holdings of the Indiana courts, decided that the defendant in order to prove an estoppel *in pais* must have pleaded it in his answer. This rule is supported by the great weight of authority and, it is believed, is of universal application in the code states excepting New York and Connecticut. *Dollar* v. *International Banking Co.* (1910), 13 Cal. App. 331, 109 Pac. 499; *Moots* v. *Cope* (1910), 147 Mo. App. 76, 126 S. W. 184; *Fletcher* v. *Painter* (1909), 81 Kan. 195, 105 Pac. 500; *Union Biscuit Co.* v. *Springfield Grocer Co.* (1910), 143 Mo. App. 300, 126 S. W. 996; *Smith* v. *Cleaver* (S. Dak. 1910) 126 N. W. 589; also cases cited in article on *"Pleading Estoppel"* in 9 MICH. L. REV., on pages 577 and 578. G. S.

LIBELS ON PERSON AND ON PROPERTY.—The recent decision in *Cleveland Leader Printing Co.* v. *Nethersole* (Ohio 1911) 95 N. E. 735, promises to invoke discussion among lawyers as well as condemnation from the ranks of the dramatic profession. Suit was brought by an actress of prominence for a libel written by the dramatic editor of the defendant newspaper. After reviewing the ideas of Dr. Torrey, the evangelist, who had recently expressed his opinion of the evils of the stage, the writer said, "We can pass over without much comment his remarks on the unwholesome atmosphere of the stage and its pernicious effects on the youthful mind. All it needs is the qualification 'sometimes.' One of these times was last week, when the whole Nethersolian repertory failed to provide a helpful situation or one that was not tarred with suggestiveness. All the plays left nasty tastes in the memory. As I recall them, 'The Labyrinth' was the worst of the lot. Cleveland received it frigidly, as is the American way when displeased or disgusted, *but when it was produced in London it was hissed so soundly that Miss Nethersole had hysterics.*"

Both of these last statements were false. Without proof of special damage, the plaintiff recovered a judgment of $2,500 in the trial court, affirmed on error in the circuit court. Judgment was reversed by the Supreme Court, which held, as a matter of law, that neither statement was libelous *per se,* even though untrue; for "to say that a woman had hysterics does not bring her into ridicule, hatred, or contempt, nor affect her in her trade and profession," and a statement in a newspaper that "a play owned by such woman had been hissed, is prejudicial to property and not to the person." Furthermore the court declares that in commenting upon matters of public interest, the editor of a newspaper acts under a certain privilege.

For the good of the public, the courts have always given great freedom of expression to critics of authors. *Carr* v. *Hood,* 1 Camp. 355; of artists, *Thompson* v. *Shackell,* 1 Moody & Malkin 187, 31 R. R. 728, which held it not actionable *per se* to call a painting a "daub"; and of actors, *McQuire* v. *Western Morning News Co.* [1903] 2 K. B. 100. But even critics must be fair. When comment becomes malevolent, or exceeds the bounds of fair opinion it has been considered libel since the day of *Dibden* v. *Swan* (1793), 1 Esp.

28, the opinion in which often since has been reiterated and enforced by the courts.

But in fact no issue of privilege, as understood in the law of libel, is ever present in these cases. *Merivale* v. *Carson*, 58 L. T. (N. S.) 331, 36 Week. Rep. 231. Whether the criticism is "fair" is the question, for when the critic goes too far all privilege vanishes. The Ohio court in the leading case quotes from the famous opinion in *Gott* v. *Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322 (which involved a libel on the curio known as the "Cardiff Giant") the rule laid down by Judge GRAY: "The editor of a newspaper has the right if not the duty of publishing for the information of the public fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest." But inadvertently the Ohio court omits what Judge GRAY adds,—"But such latitude does not include false, reckless, and unjustifiable statements." *Gott* v. *Pulsifer*, *supra*.

And whatever privilege or liberty may exist, never has been extended to the gratuitous assertion of matters of fact for which there is no foundation. *Morrison* v. *Belcher*, 3 F. & F. 614, I COOLEY, TORTS, Ed. 3, p. 451. Misstatements of facts, such as were made of Miss Nethersole and her play, cannot be deemed logically either comment or criticism. If "The Labyrinth" is an immoral play, no court could censure a fearless dramatic critic for publishing the fact. In an old case, (1808), see note on *Tabart* v. *Tipper*, 1 Camp. 350, Lord ELLENBOROUGH forcibly said, "That publication I shall never consider libelous which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to expose a vicious taste in literature, or to censure what is hostile to morality." Yet in *Tabart* v. *Tipper*, *supra*, he held it actionable falsely to impute to a book-seller the publication of a ridiculous poem. There seems but little distinction between the unfounded statement that a man has published a vicious or foolish book and the false assertion that an actress has appeared in a play so immoral that it was hissed off the boards.

The question of privilege or fairness of criticism, however, is not vital in this case. For the court concedes that part of the words are libelous, but not so *per se*, because they affect only the play and therefore require proof of special damage. *Dooling* v. *Budget Pub. Co.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83; *Kennedy* v. *Press Pub. Co.*, 41 Hun 422. "As a thing has no rights and as no one owes any duty to a thing, and as no wrong can be done to a thing, language which merely concerns and affects a thing cannot be actionable *per se*." TOWNSEND, SLANDER & LIBEL, Ed. 3, § 204.

Therefore, logically, the fundamental issue seems to narrow down to this—Was the false statement that the play "was hissed so soundly that Miss Nethersole had hysterics," a libel on the play alone, casting no reflections on the leading actress, and causing no injury to her in her profession?

As SPEAR, C. J., well remarks in the leading case, "the distinction between a libel on a person and a libel upon that which is the property of the person is somewhat nice and the decisions illustrating the subject are not consistent one with another." The authorities do not in fact lay down a good working

rule. Most of the cases in the books and all of those cited by the Ohio court illustrating libels on property, as distinct from libels on the person, are of a special class dealing only with a merchant or a manufacturer and the article sold or made. Even there the courts seem not in accord. In *Victor Safe & Lock Co.* v. *Deright,* 77 C. C. A. 437, a statement that plaintiff's products were cheap safes, etc., was held a libel on property and not on the plaintiff. In *Dooling* v. *Budget Pub. Co., supra,* it was held that an article stating that a dinner furnished by a caterer on a public occasion was "wretched and was served in such a way that even hungry barbarians might justly object" was not actionable without proof of special damage. But in *Henkel* v. *Schaub,* 94 Mich. 542, 54 N. W. 293, where plaintiffs owned a blooded stallion for breeding purposes and defendants told various persons that it was nothing but a grade horse, the court held that this was not a libel on the property but a libel on the plaintiffs in their business, and that it was actionable without proof of special damage. Again, the Ohio court, in the principal case, uses as an illustration of libel on property, the comments of various papers on the proofs which Doctor Frederick Cook, the explorer who lately claimed to have discovered the North Pole, offered to substantiate his claim when he was on a lecture tour, in which the writers attempt to show the proofs were bogus. Yet in *Burtch* v. *Nickerson,* 17 Johns. 217, 8 Am. Dec. 390, it was held a libel on the person to say of a blacksmith, "He keeps false books."

Despite the apparenty irreconcilable conflict in the above cases, there seems possible a basis of distinction. In *South Hetton Coal Co.* v. *The Northeastern News Asso.* [1894] 1 Q. B. 133, where the court held a statement as to the unsanitary condition of cottages let by the plaintiff to its workmen a libel on the plaintiff calculated to injure its business, without averment or proof of special damages, Lord ESHER, attempting to demonstrate the line of distinction, said, "Suppose plaintiff was a merchant who dealt in wine, and it was stated that wine which he had for sale of a particular vintage was not good wine; that might be stated as only to import that the wine of the particular year was not good in whosever hands it was, but not to imply any reflection on his conduct of his business. In that case the statement would be in regard to his goods only and there would be no libel. But if the statement were so made as to import that his judgment in the selection of wine was bad, it might import a reflection on his conduct of his business and show he was an inefficient man of business. If so, it would be a libel."

Viewed in the light of Lord ESHER'*s* distinction, the decision in the *Nethersole* case is worthy of careful consideration. The statement made no attack on the faulty construction of the play, or upon its lack of literary merit; the words were a libel on the performance, *i. e.,* the drama as presented by Miss Nethersole in London. Can the average play-goer hear the remark that "the play was hissed so soundly that Miss Nethersole had hysterics," without feeling that some reflection has been cast on the actress' judgment, her reputation, and her conduct as a member of her profession?

Moreover, upon close investigation of the authorities, some readers would be likely to come to the conclusion that the difference between a libel on property and a libel on the person, as illustrated by the cases involving man-

ufacturer and article manufactured, does not apply here. The analogy appears hardly close enough, and not quite fair. The issue presents itself—Is a libel as to the performance of a play like "The Labyrinth," an attack on the play as totally distinct from the artist?

The critic attacked the production for baseness, suggestiveness and immorality. If we take into account, as we must, the unity of artist and play in any serious performance, the merging of the personality of the performer into her "part," and the fact that the selection is her own, can we condemn the play, as she plays it, without also casting some reflection upon her? Especially in dramas of such type, often the interpretation by the actor is a factor as vital as the inanimate product of the author. "Carmen," in the hands of a lover of the beautiful, is the highest art; yet it can be, and has been, made a vulgar show. Whether we can hiss the immoral "thing" so that the person goes into hysterics, and cast no stigma on her, is a question open to nice distinction. At all events, the case under discussion will not settle for most legal thinkers the exact difference between a libel on property and a libel on its owner. S. W. D.

THE CONFLICT BETWEEN A PATENTEE'S RIGHT TO MONOPOLY AND A STATE ANTI-MONOPOLY STATUTE.—A corporation doing intrastate business is subject to the anti-trust laws of a State wherein it does business even though its principal violation of such laws is a combination of firms dealing chiefly in articles covered by United States patents. The State under its laws may withdraw the right of such a corporation to do business within its borders. This view was upheld in *State* v. *Creamery Package Mfg. Co.*, 132 N. W. 268, wherein the court affirmed its earlier decision, reported in 110 Minn. 415, 126 N. W. 126, 623, 136 Am. St. Rep. 514.

There is a sharp conflict of authority in regard to a restraint on articles all of which are patented. The same division is carried into the conflict when the presence of patented articles is claimed to leaven the entire transaction so as to legalize it in its entirety.

The view of the authorities holding that the virtue of a patent grant prevents the State from interfering with the patentee is well expressed in the words of a federal court:

"In consideration that a patentee will give his invention to the public with full drawings and specifications, so as to enable the public to freely use it at the expiration of seventeen years, a grant is made to him of the exclusive right to the monopoly of the patented article during that time. The rights so acquired by the patentee under a grant from the United States are entirely inconsistent with the patentee being made subject to the provisions of the anti-trust laws of the several states." *Columbia Wire Co.* v. *Freeman Wire Co.*, 71 Fed. 302; *Edison Electric Light Co.* v. *S. M. Electric Light Co.*, 53 Fed. 592; *Strait* v. *Nat. Harrow Co.*, 51 Fed. 819; *American Soda Fountain Co.* v. *Green*, 69 Fed. 333.

Or to view the question from the other side, as expressed in *Grover & Baker Sewing Machine Co.* v. *Butler*, 53 Ind. 454, 21 Am. Rep. 200 (at page 204) if the State were not barred from interfering, "it is easy to see that a